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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

CONTAINER CORPORATION OF AMERICA,
Appellant,

VS.

FRANCHISE TAX BOARD,
Appellee.

On Appeal From The Court of Appeal of the State of California for the First Appellate District

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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October 21, 1981.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I

PROBABLE JURISDICTION SHOULD BE NOTED IN VIEW OF THE ASARCO AND WOOLWORTH CASES

Subsequent to appellant filing its Jurisdictional Statement, the Court noted probable jurisdiction in the *Asarco* and *Woolworth* cases.[1] These cases are concerned, *inter alia*, with different aspects of the issue raised in *Mobil Oil Co. v. Vermont*, 445 U.S. 425 (1980), *i.e.*, the taxation of dividend income from subsidiaries and affiliates. In the *Woolworth* case the dividends are all from foreign subsidiaries; in the *Asarco* case a substantial part of the dividends are from foreign subsidiaries.

In view of the fact that the Court has noted probable jurisdiction in the *Asarco* and *Woolworth* cases, appellant submits that the Court should note probable jurisdiction in the instant case. By so doing, the Court can finally resolve whether there are constitutional limitations on the states' ability to include *all* of the income of foreign affiliates and subsidiaries in the tax base of a United States corporation through worldwide unitary combination. The issue presented in the instant case, inclusion of total earnings of

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[1] *American Smelting & Refining Co. v. Idaho State Tax Commission*, 99 Idaho 924, 592 P.2d 39 (1979), *vacated and remanded sub. nom. Asarco Inc. v. Idaho State Tax Commission*, 445 U.S. 939 (1980), *per curiam on remand*, 102 Idaho 38, 624 P.2d 946 (1981), *prob. juris. noted*, No. 80-2015 (U.S. Sup. Ct. October 5, 1981) and *F. W. Woolworth Co. v. Taxation and Revenue Department*, 95 N.M. 519, 624 P.2d 28 (1981) *prob. juris. noted*, No. 80-1745 (U.S. Sup. Ct. October 5, 1981).

foreign affiliates and subsidiaries, is related to but broader than the issue presented in *Asarco* and *Woolworth, i.e.*, inclusion of foreign source dividends.[2] Thus, if this Court only decides the issues raised in *Asarco* and *Woolworth*, significant issues relating to state taxation of foreign source income will remain unresolved.

The brief *amicus curiae* filed by the Committee on State Taxation of the Council of State Chambers of Commerce states that there are a large number of cases pending at the judicial and administrative levels involving the combined reporting issue. By accepting this case, the Court can resolve important constitutional questions involving combined reporting which should substantially reduce pending litigation in this area.

II

REPLY TO FTB MOTION TO DISMISS OR AFFIRM

The Franchise Tax Board ("FTB") asserts that "the specific question sought to be reviewed in the jurisdictional statement was not properly raised in the state courts from which an appeal is taken." Motion of Appellee to Dismiss or Affirm ("Motion") at 2, 40. The FTB makes no effort whatsoever to substantiate this assertion as indeed it cannot. Container raised the constitutional issues in its claims for refund to the FTB, in its complaint, C.T. 8-9, 10, 13, 24-25,

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[2]In the *Asarco* case, six of the subsidiaries (some apparently foreign subsidiaries) were required by the state to be included in a combined report with the parent. The dividends from these subsidiaries were not taxed. *Asarco* did not raise the combination issue in its state court appeal (592 P.2d 39, 43, 45) nor in its Jurisdictional Statement filed with this Court.

60-71, 92-93, 114-116, and in its briefs to the courts below. Both the Superior Court and the Court of Appeal specifically rejected the constitutional claims. App. A, Jurisdictional Statement, A-17 to A-26; App. B, Jurisdictional Statement, A-31.

The FTB also alleges that Container recited the facts inaccurately. Motion at 6 et seq. and 17 et seq. Container believes that its statement of facts is accurate and that many of the factual assertions made by the FTB are inaccurate. In any event, the facts are undisputed since they were presented entirely through a written stipulation, plus the uncontroverted testimony of a single expert witness. That part of the record including the stipulation of facts and testimony has been received by the Court.

The FTB states that Container did not argue for a modification of the formula before the lower courts. Motion at 12, 13, 37. On the contrary, Container did ask for a modification; it has consistently sought the use of arm's-length/separate accounting for apportioning income as between Container and the foreign subsidiaries while agreeing to formulary apportionment as to the domestic operations of Container itself.[3] Separate accounting has long been recognized as an alternative to formulary appor-

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[3]Appellant has consistently used the phrase arm's-length method in the same way as the FTB has used the phrase separate accounting. Appellant has used the phrase arm's-length because that is the term most often used by the federal government in describing the federal method of apportioning income as between United States corporations and foreign affiliates.

tionment.[4] In addition, if the federal government is to speak with one voice in the area of foreign commerce, the arm's-length/separate accounting method is the only permissible apportionment method in this case since it is the system adopted by the United States in apportioning income as between United States corporations and foreign affiliates.

It is also important to note that the FTB devotes only a single sentence to the point that world-wide unitary combination clearly conflicts with and impairs the arm's-length method adopted by the United States for apportioning income between United States and foreign affiliated corporations. The FTB's only attempt to answer this vital point is a citation to the *Mobil* case. Motion at 28, 29. Of course, *Mobil* involved only the question of the proper apportionment, as between the states, of dividends received by a United States corporation. It did not involve an apportionment of income as between the states and foreign countries.

Finally, the FTB argues that it is only apportioning to California seven to eight percent of the world-wide income of Container and its foreign subsidiaries. The facts are, however, that for the three years involved, world-wide unitary combination apportioned to California income totalling over $1,200,000 in excess of that determined by the arm's-length federal method. Exhibit A to Stipulation of Facts.

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[4]It is specifically recognized as an alternative in the Uniform Division of Income for Tax Purposes Act, which California and 23 other states have adopted. 7A U.L.A. (1980 P.P.) at 7. See Section 18 of the Uniform Act and Section 25137, Cal. Rev. & Tax. Code (Deering).

Furthermore, the Court's decision in this case will not be limited to California. If California can apportion additional income to the state through world-wide unitary combination, every other state can follow California's example and achieve a similar result.

CONCLUSION

The motion to dismiss or affirm should be denied and probable jurisdiction should be noted.

Dated: October 21, 1981

Respectfully submitted,

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